United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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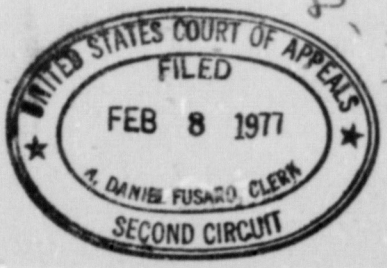
76-7560



2-8-77

To be argued by
MORRIS WEISSBERG

BP/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs-Appellants,

-against-

LOUIS L. LEVINE, individually, and as Industrial Commissioner of the State of New York,

Defendant-Appellee.

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Docket #75-7462
Docket #76-7560

APPELLANTS' REPLY BRIEF

N. GEORGE TURCHIN
MORRIS WEISSBERG
Attorneys for Appellants
253 Broadway
New York, N.Y. 10007
(212) 267-3250

Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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APPELLANTS' REPLY BRIEF

I.

The complaint alleged (par. 19, pp. 34-35) that defendant's Regulation 601.8 unconstitutionally ascribed to each plaintiff guilt by association, and deprived each plaintiff of its property without due process of law, by automatically disqualifying each plaintiff from registering with the New York State Labor Department its own apprentice training agreement with its own apprentices, solely on the basis that the plaintiffs are members of the United Construction Contractors Association, the registration of whose apprentice training agreement with Local 363 of the Teamsters Union the defendant cancelled after an administrative hearing of charges that United and Local 363 violated apprentice training regulations.

Defendant's brief did not argue that his Regulation 601.8 is constitutional. His beief did not even mention his Regulation 601.8.

Instead, the defendant's brief argued only that his cancellation of the Labor Department's registration of the apprentice training agreement between United and Local 363 bars the plaintiffs from thereafter registering

with the State Labor Department their own apprentice training agreements with their own apprentices, because the defendant gave each plaintiff due process of law by mailing to each plaintiff a copy of his notice to United and Local 363 that he proposed to cancel the Labor Department's registration of their apprentice training agreement for violations of apprentice training regulations with which he charged them, (Point I), and because the plaintiffs made no effort to dissociate themselves from such violations of which they are chargeable with knowledge (Point II).

We submit there is no merit to these arguments; and that these arguments do not meet the issue whether defendant's Regulation 601.8 can constitutionally disqualify each plaintiff from exercising the right given him by sections 811 and 816 of the New York Labor LAw to register with the State Labor Department its own apprentice training agreement with its own apprentices, solely on the basis that the defendant cancelled the Labor Department's registration of the apprentice training agreement between Local 363 and United Construction Contractors Association, in which the plaintiffs were members.

In our main brief, pp. 19-20, we cited and quoted from cases which held that members of a corporation or association can only be denied eligibility for a statutory benefit or privilege because of civilly wrongful or criminal actions by a corporation or association of which they are members, upon evidence that they authorized, ratified or participated in such actions.

Defendant's brief made no attempt to discuss or to distinguish those cases, and it passed them by in silence.

Defendant's argument that he gave the plaintiffs due process of law by mailing to each of them a copy of his notice to Local 363 and to United that he proposed to cancel the Labor Department's registration of their apprentice training agreement for violations of apprentice training regulations with which he charged them, obviously was not due process of law for the plaintiffs, because the plaintiffs are not the trade association whom the defendant charged with such violations; and his administrative determination that the trade association and the labor union committed such violations made no charge and no finding that any of the plaintiffs committed such violations, or that they authorized, ratified or participated therein.

There is also no merit to defendant's further argument that he disqualified the plaintiffs by due process of law because United represented the plaintiffs, as its members, at the administrative hearing upon his charges that United violated apprentice training regulations, and that, consequently, each plaintiff, individually, is bound by defendant's administrative determination that United committed such violations.

But each plaintiff is only bound by that administrative determination in his status as a member of United, and not as an individual employer.

In our main brief, p. 20, we quoted from Hartford Empire Co., v. United States, 323 U.S. 386, 405-406 (1944):

> "Collins is found to have been and still to be, a member of the Association's statistical committee, but the bill does not charge him individually with any conduct in that relation. Of course, any injunction against the Association and its officers will bind him so long as he remains in that relationship. *** the evidence is not persuasive of participation in any conspiracy charged or proved."

In this case, too, the defendant's notice of violations addressed to United and Local 363, did not charge any of the plaintiff with any violations of apprentice training regulations. Consequently, defendant's administrative determination sustaining charges against United and Local 363, and cancelling the Labor Department's

registration of their apprentice training agreement, only binds each plaintiff in his status as a member of United, but not in his status as an individual employer to whom sections 811 and 816 gave a right to register with the Labor Department his own apprentice training agreement with his own apprentices.

II.

In Point II of his brief (pp. 23-24) defendant argued that in some unexplained way each plaintiff is chargeable with knowledge of the apprentice training violations which his administrative hearing found were committed by United and Local 363; and that (p. 24):

> "Plaintiffs' failure to dissociate themselves from the sponsor thus constitutes a ratification of the acts found to warrant deregistration."

But defendant has not served an answer, or any affidavit alleging that the plaintiffs are chargeable with knowledge of apprentice training violations by United and Local 363; and he has not explained in his brief what facts make it legally possible for each plaintiff to be individually charged with knowledge of the apprentice training violations which the defendant found, after an administrative hearing, were committed by United and

Local 363, or by certain named employers, other than these plaintiffs.

Moreover, defendant has not shown how each plaintiff can be charged with knowledge of such violations when the plaintiffs filed a Statement under District Court Rule 9(g), in opposition to defendant's motion for summary judgment, in which plaintiffs alleged (A71):

> "None of the plaintiffs agreed to, authorized ratified or participated in any of the acts alleged in defendant's notice of proposed de-registration; and that plaintiffs did not have actual or constructive knowledge of any such acts."

Although defendant made a motion for summary judgment in his favor, he did not file any Statement under District Court Rule 9(g), denying plaintiffs' above-quoted statement, and showing how the plaintiffs are chargeable with knowledge of the apprentice training violations which he found to have been committed by United and Local 363, and by certain named employers other than these plaintiffs.

Defendant's brief cited the 1945 decision in Phelps-Dodge Corp., v. FTC, 139 F.2d 393 (C.A. 2, 1945) to support his argument that a member can be charged with knowledge of wrongful actions by an association or corporation of which he is a member, and he can be held

legally responsible for failure to dissociate himself therefrom.

But in the Phelps-Dodge case, the parties stipulated that the Association acted as a clearinghouse of information about current and future prices of chemicals and fungicides, and trade discounts thereon. The court said that the exchange of such information "bears the taint of illegality", as price fixing which is prohibited by the ant . st laws. 139 F.2d at 396.

Even so, the Court said that members of the Association were not legally responsible for price fixing by the association, or by other members, without evidence that they had knowledge thereof. Thus, the Court said (139 F.2d at 396):

> "The Commission argues that this being established, the complicity of Powell, Southern, Stauffer and Cyanamid is proved by the fact of their membership to the association. We are not prepared to hold that mere membership is enough. If the purposes of any association are lawful on their face, we doubt that its members should be held for acts of the association outside its purposes, unless knowledge of the illegal acts is brought home to the members."

While the decision in the Phelps-Dodge case also said (139 F.2d at pp. 396-397):

> "once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing",

we submit that this statement has limited application to the facts in that case, in which exchange of information about current and future prices and trade discounts was used to fix and to control prices, which had "the taint of illegality", and it was expressly prohibited by the anti-trust laws.

In Kline v. Coldwell, Banker & Co., 508 F.2d 226, 231-232 (C.A. 9, 1974), cert. denied 421 U.S. 963, the Court commented on the above-quoted statement in the Phelps-Dodge case, as follows:

> "Since Phelps Dodge, the 'Membership-Ratification' theory has been reformulated by numerous courts including this circuit. In each of these reformulations much of the stress falls upon the knowledge component. In Riss & Co. v. Association of American Railroads, 187 F. Supp. 306, 312-313 (D.D.C. 1960), the court said:
> ' The individual .... members of the associations can be declarations only if they are shown to have known and approved of such activities and of their unlawful objectives.' (Emphasis added).

In Vandervelde v. Put & Call Brokers & Dealers Association, Inc., 344 F. Supp. 118, 155 (S.D.N.Y. 1972) it was recently stated:

> 'The key element of proof for linking an Association member to the acts of his organization is a showing that he knew of and condoned the act in issue.' (Emphasis added)
>
> * * *

It thus clearly appears that in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have 'knowingly, intentionally and actively participated in an individual capacity in the scheme'."

In United States v. Purin, 486 F.2d 1363 (C.A. 2, 1973), cert. denied 416 U.S. 987 (1974), this Court said:

> "*** a mere willing participation in acts with alleged co-conspirators, knowing a general way that their intent was to break the law, is insufficient to establish a conspiracy."

In United States v. Steinberg, 525 F.2d 1126, 1134 (C.A. 2, 1975), this Court said:

> "The proof demonstrates little more than that Parker and Steinberg were friends and fellow drug users. Association with a conspirator, without more, is insufficient to establish the requisite degree of participation in a conspiracy venture."

Other federal circuit courts have held that:

> "Mere knowledge, approval or acquiescense in the object or purpose of a conspiracy does not make one a conspirator."

United States v. Thomas, 468 F.2d 422, 425 (C.A. 10, 1972), cert. denied 410 U.S. 935, 939; Causey v. United States, 352 F.2d 203, 207 (C.A. 5, 1965); United States v. Edwards, 438 F.2d 1154, 1158 (C.A. 5, 1974); United States v. Basurto, 497 F.2d 781, 793 (C.A. 9, 1974).

III

Defendant also argued (p. 27):

> "that substantially the same federal constitutional claims were raised and determined"

in United's law suit in the State court, and in this suit by the plaintiff in the Federal district court.

Defendant argued further (p. 27):

> "paragraph 11 (A 82-83) explicitly raises contentions that petitioners were 'deprived of their liberty and property without due process of law, and denied ... equal protection of the laws".

This is an incomplete quotation of only part of the allegations in United's petition which alleged (82):

> "11. In the absence of statutory authorization for involuntary deregistration of apprentice training agreements, the provisions of respondent's aforesaid regulations for involuntary

deregistration of apprenti[illegible] training agreements, and his deregistration of petitioners' apprentice training agreement thereunder, impaired the obligation of the contract made by the said agreement, deprived the petitioners of their liberty and property without due process of law, and denied to them the equal protection of the laws, contrary to Article 1, sections 6 and 11 of the New York Constitution, and Article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, and it was unconstitutional and invalid."

The complaint in this case alleged entirely different unconstitutional claims, as follows (A34-35):

"19. By reason of the foregoing, the provisions of Sections 601.7(c)(4) and 601.8 of the said Regulations, that upon the making of a determination deregistering an apprentice training program, the registration of apprentices thereunder shall be cancelled; and that no employer or union which participated therein shall be eligible to register any apprenticeship training program under any other name for three years, anddefendant's actions thereunder following his determination of May 1, 1975 deregistering the apprentice training program of UNITED, Local 363, JAC, in automatically disqualifying each plaintiff from employing registered apprentice electricians, from making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians, and from registering with the New York State Labor Department apprenticeship agreements in their individual names as employers, were contrary to the facts, and without basis in fact, and ascribed to each plaintiff guilt by association for acts allegedly performed by other employers, or by UNITED, Local 363, JAC, and thereby the said Regulations, and defendant's actions implementing them, deprived each plaintiff of liberty and property and without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, con-

> sequently, the said Regulations, and defendant's actions implementing them, are unconstitutional and invalid."

Thus, United's State Court petition alleged that defendant's cancellation of the Labor Department's registration of its apprentice training agreement with Local 363 deprived United of due process of law and impaired the obligation of United's apprenticeship agreement with Local 363. There is not a word in United's State Court petition that the defendant unconstitutionally disqualified the individual plaintiffs from registering with the State Labor Department their own apprentice training agreements with their own apprentices, or that the defendant's Regulation 601.8 is unconstitutional because it provided for the automatic disqualification of the plaintiffs from registering their own apprentice training agreements with their own aprentices, solely on the basis that the Labor Department had cancelled the registration of an apprentice training agreement between a labor union and a trade association in which individual employers were members.

The complaint in this federal case, in contrast, did not allege that the defendant's cancellation of the State Labor Department's registration of the apprentice

training agreement between Local 363 and United was unconstitutional or otherwise invalid. Instead, it alleged only that defendant's disqualification of the individual plaintiffs under his Regulations 601.8, solely on the basis of their membership in the trade association, unconstitutionally deprived them of due process of law.

Therefore, we submit that United's State Court petition and plaintiffs' federal complaint in this case, show on their face that the causes of action pleaded therein are different and unrelated.

Consequently, the judgment dismissing the State Court petition is not res judicata of this federal complaint.

Throughout his brief, including this branch of the case, defendant treats the plaintiffs as being identical with their trade association; and he argues repeatedly in different forms that an administrative determination and a judgment against the trade association is a judgment that is res judicata against each member individually, on the merits; that notice to the association is due process to each member, because the association repre-

sents each member.

But we cited and quoted cases which held that individual members of an association are not bound by a judgment against such association with respect to their status and claims as individuals, as distinguished from their status and claims which are based only on their membership in the association. Fox Publishing Corp., v. United States, 366 U.S. 683, 691 (1960); Kersh Lake District v. Johnson, 309 U.S. 485, 494 (1940).

In the Kersh Lake case, supra, the Court said that a judgment against an association does not bar a member from thereafter litigating claims that are "peculiar and personal" to such member, 309 U.S. at 494.

Plaintiffs' allegations in this case that they did not authorize, ratify, participate in, or have knowledge of the apprentice training violations which the defendant found to have been committed by United and "peculiar and personal" to the plaintiffs. Consequently, the State Court judgment dismissing United's petition is not res judicata of such "peculiar and personal" claims.

Defendant's brief made no attempt to discuss or to distinguish the Fox Publishing and Kersh Lake cases; and defendant even cited the Kersh Lake case, but he did not

main brief, pp. 39-40 - held that arbitrary discrimination in employment on the basis of membership in labor unions, or alienage, unconstitutionally denied the equal protection of the laws; and we cited other cases that the government can not constitutionally discriminate between contractors in awarding public work contracts on the basis of their employment of unionized employees. Defendant's brief did not discuss, or distinguish those cases.

We submit that in this case prosecution of plaintiffs' trade association for violation of apprentice training regulations, and cancelation of registration of their apprentice training agreement for such violations, without prosecuting their competitors who committed similar violations, solely because their competitors employed members of a different labor union, is the very kind of arbitrary and invidious discrimination that unconstitutionally denies the equal protection of the laws, particularly where the practical effect of such discrimination is to place the plaintiffs at such great economic disadvantage as practically puts them out of business and leaves to their competitors a monopoly in the business of bidding for and obtaining governmental contracts for electrical work in the New York metropolitan area.

explain how that case supports his arguments in this case.

Plaintiffs' brief, in contrast (pp. 47-49), discussed and distinguished the cases on res judicata which were cited in the decision below.

IV.

Defendant argued (pp. 24-25):

> "selective application of deregistration by defendants does not even remotely constitute the kind of suspect classification that works as invidious discrimination in violation o the equal protection clause."

Yick Wo v. Hopkins, 118 U.S. 356 (1885), and People v. Walker, 14 N.Y.2d 901 - cited in our brief, p. 39 - were cases of selective enforcement of an administrative regulation, and of criminal statutes, which were held to deny equal protection of the laws because they singled out individuals for prosecution without equally prosecuting all persons in similar circumstances.

Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1948); American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1948); and Truax v. Raich, 239 U.S. 33 (1915) - cited in our

CONCLUSION

THE JUDGMENTS APPEALED FROM SHOULD BE REVERSED, DEFENDANT'S MOTIONS TO DISMISS THE COMPLAINT, OR FOR SUMMARY JUDGMENT SHOULD BE DENIED. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED.

Dated: New York, New York
February 10, 1977

Respectfully submitted,

N. GEORGE TURCHIN
MORRIS WEISSBERG
Attorneys for Appellants

2 Copies Received

FEBRUARY 8, 1977

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